

ADMINISTRATIVE POLICY



STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE:	FREQUENTLY ASKED QUESTIONS RETAIL/SERVICE ESTABLISHMENT SALES EXCEPTION	NUMBER:	ES.A.10.2
		SEE ALSO:	ES.A.10.1 ES.A.10.3
CHAPTER:	RCW 49.46.130(3)	ISSUED:	1/2/2002

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

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If an employer meets the requirements for a retail establishment and the employee's pay is primarily commission, must the employer pay time and one-half the minimum wage for hours worked in weeks when no overtime is worked? No.

What is the employer's responsibility in regard to paying commissions to workers on separation? If the employer had committed to paying commissions earned prior to separation, the worker may have defensible claim for the agreed wage as implied or actual contract. If the employer has made no agreement to pay commissions at post-separation intervals or some other agreement, the only requirement the department will consider is that the employee be paid minimum wage and one and one-half times the minimum wage for any hours of work over 40 in the final pay period.

How are recordkeeping requirements different for establishments utilizing the exemption than for other businesses? The retail establishment is bound by all recordkeeping requirements set forth in WAC 296-128 and WAC 296-126.

FLSA requires a record of sales, of what constitutes the representative period, and copies of agreements between the employer and employee specifying the terms of the commission compensation arrangement with employee signature demonstrating employee understanding.

Are all employees of retail establishment exempted from the Minimum Wage Act if they are paid on a commission basis even if they do not make the sales? If the establishment qualifies for the exemption—that is, 75 percent of dollar volume is not for resale and is

recognized as retail sales or services—then all employees whose pay is at least 50 percent comprised from commissions are exempted from the overtime premium (except as noted below), whether they work in sales or in other activities.

For example, an employee of an auto body shop writes up service orders with customers. The employee is paid a percentage of the service orders written. This is commission pay and exempts the worker under RCW 49.46.130(3), provided all other requisites are met. Likewise, if a mechanic is paid on a percentage of the sale, the mechanic is also deriving commissions from a retail establishment in this case and is exempted per RCW 49.46.130(3). If the employer charges his customers an hourly labor fee and the mechanic is paid a percentage of the billed rate, the wages are considered commissions.

The mechanic who is paid according to the number of hours called out in industry journals is not necessarily a commission-paid worker and is not in all cases exempt from overtime protection. In the very limited circumstances described below, the department may find certain “flat rate” employees exempt:

1. All conditions must be met for exemption: representative period, record of employee understanding and agreement, and wages which exceed time and one-half the minimum wage and are based on flat rate qualifying as “commission.”
2. When the employee is paid a certain proportion of the labor charged to the customer whether expressed in percentage or in terms a certain dollar amount per “flat rate hour,” and if the employer does not change the employee’s share if the customer’s bill is adjusted, the department will not deny that such payments represent commissions for the purposes of RCW 49.46.130(3).

When a worker is paid on a flat rate basis without regard to charges made to the customer, the flat rate is not considered commission.

What must the employer pay for overtime in those weeks when the total earnings derived from commissions and other pay do not exceed one and one half times the minimum wage for all hours worked in the period? When total earnings of more than 50 percent commissioned earnings exceed one and one-half times the minimum wage for all hours worked regardless of how many in excess of forty, there is no additional compensation due. In weeks where the total earnings fall short, the employer must pay time and one-half the regular rate of pay for all hours over forty in that workweek. Regular rate of pay is determined by dividing total earnings for the workweek by the hours worked. For all hours over forty, an additional one-half the regular rate is owed.

The employer may pro-rate all sales in the representative period on a weekly basis. In those cases, the earnings for the entire period would need to be investigated for overall compliance within that representative period.

How do bonuses affect the worker’s entitlement? They don’t, except in those weeks where the worker’s earnings fell short of the exemption minimum wage. In those weeks where the worker would be entitled to overtime compensation because total earnings were insufficient, the bonus must be factored in as a part of the regular rate of pay for the affected week(s).

What is the minimum length for representative period? A representative period must be at least one month in duration but not more than one year. This minimum length is used to determine that the worker is deriving at least half the wages from commissions.